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JOHN F. DAVIS, CLE

IN THE

Supreme Court of the United States

NO. 450

OCTOBER TERM, 1962

LEOPOLD W. MAHLER and HELEN E. MAHLER, his wife, and BERTHA EBERTSHEIM,
Petitioners,

v.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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OCTOBER TERM, 1962

LEOPOLD W. MAHLER and HELEN E. MAHLER, his wife, and BERTHA EBERTSHEIM,
Petitioners,

v.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Robert A. Cohen, on behalf of Leopold W. Mahler, Helen E. Mahler and Bertha Ebertsheim, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on June 27, 1962, rehearing denied July 20, 1962.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Pennsylvania (R., 176a-183a, 205a-206a)[1] is reported at 196 F. Supp. 362 (1961). The opinion of the court of appeals (App., *infra*, pp. 40) is reported at .... F. 2d .... (1962).

1. Throughout this petition record references are to the joint appendix filed in the court of appeals.

Statutes and Regulations Involved.

JURISDICTION

The judgment of the court of appeals (App., *infra*, p. 63) was entered on June 27, 1962. A petition for rehearing was denied July 20, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Does the United States owe an actionable duty of care to users of a federal-aid highway in Pennsylvania arising from negligent inspections of construction of the highway, and negligent or inadequate maintenance inspections after the highway is constructed?

2. Is that portion of petitioners' tort claim which is based on operational activities occurring during the planning and design of a federal-aid highway excepted from the Federal Tort Claims Act as a "discretionary function"?

Statutes and Regulations Involved

1. Federal-Aid Road Act of 1916, Sec. 7, 29 Stat. 358, 23 U.S.C. Sec. 48 (1952 Ed.)

2. Federal Highway Act of 1921, Secs. 12, 13, 14, 42 Stat. 215, 23 U.S.C. Secs. 13-15 (1952 Ed.)

3. Federal Aid Highway Act of 1938, Sec. 12, 52 Stat. 636, 23 U.S.C. § 8 (a) (1952 Ed.) now 23 U.S.C.A. § 109 (a) (Supp. 1961)

4. Federal-Aid Highway Act of 1944, 58 Stat. 838, now 23 U.S.C.A. § 109 (d) (Supp. 1961)

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Statutes and Regulations Involved.

5. Pub. L. 85-767, § 1, Aug. 27, 1958, 72 Stat. 885, 23 U.S.C.A. § 101 (a) (Supp. 1961)

6. Federal Tort Claims Act, 28 U.S.C. 2680 (a), 28 U.S.C. 1346 (b), 60 Stat. 842 (1946)

7. U. S. Department of Commerce, Bureau of Public Roads, Policy and Procedure Memorandum 21-11.1, March 31, 1958, "Program and Project Procedures", Subject: Maintenance

Pertinent parts of the foregoing Statutes and Regulations are set forth in the Appendix to this petition (*infra*, p. 31).

STATEMENT OF THE CASE

1. The Legislative Framework

The original Federal-Aid Highway Act of 1916 established a pattern of federal-state participation, functions, and responsibilities relating to highway design, construction, and maintenance.

Funds appropriated by Congress for the highway program are apportioned to the various states according to a statutory formula. 23 U.S.C. § 21, 42 Stat. 217 (1921.) The states then create general programs to employ these funds and prepare estimates for each project. 23 U.S.C. § 12, App., *infra,* p. 31. Detailed plans and specifications must then be submitted by the respective states to the Bureau of Public Roads. These plans must then be approved by the Bureau of Public Roads before it assumes any obligation to reimburse any state for a percentage of construction costs.

Construction contracts are then awarded by the state. The states pay the contractor, and the respective states become and remain responsible for the direct supervision of construction and for the maintenance of the highway after completion. But the Bureau of Public Roads is required to inspect to make sure that construction is in accordance with the plans agreed upon. 23 U.S.C. §§ 13, 14, App., *infra,* pp. 32, 33. The Bureau of Public Roads may in its discretion pay its share of the work as it progresses, or it may withhold payment until the project is satisfactorily completed. 23 U.S.C. § 14. If the Bureau of Public Roads finds on inspection that a state is not properly maintaining a highway constructed with funds supplied by the United States, it

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must notify the state, and if, within ninety (90) days thereafter, proper maintenance is not instituted, federal aid funds are withheld from that state until the situation is rectified. 23 U.S.C. §§ 15 and 48, App., *infra*, pp. 33, 34.

Although the foregoing provisions of the Federal Aid Road Act regarding maintenance may not expressly require that maintenance inspections must be made, they set forth the responsibilities of the federal government should it engage in the making of these inspections. In fact, the Bureau of Public Roads has accepted the responsibility of making maintenance inspections of federal-aid highways, and has established regulations governing scheduling and procedures. The purpose of those inspections is to provide for safe and efficient utilization of the highway. R, 186 a; Bureau of Public Roads Policy and Procedure Memorandum 21-11.1, App., *infra*, p. 37.

The Federal Aid Highway Act of 1938, App., *infra*, p. 34, provided that thereafter the Secretary of Agriculture[2] shall approve only such methods of bidding and such plans and specifications of highway construction as will be conducive to safety, durability, and economy of maintenance.

Section 12 of the Federal-Aid Highway Act of 1944 (App., *infra*, pp. 34, 35) provides that the Public Roads Administration must concur in the location, form, and

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2. The powers given to the Secretary of Agriculture in the Federal-Aid Road Act of 1916, as amended, and herein are now exercised by the Secretary of Commerce. See 1939 Reorg. Plan No. 1, 53 Stat. 1426; Act of June 30, 1949, § 103 (a), 63 Stat. 380; 1949 Reorg. Plan No. 7, 63 Stat. 1070.

character of informational, regulatory, and warning signs; the Commission of Public Roads is expressly directed to concur only in such installations as will promote the safe and efficient utilization of the highways.

The Federal Aid to Highway statutes were codified by Pub. L. 85-767, Aug. 27, 1958, 72 Stat. 885, 23 U.S.C. § 101 et seq. 23 U.S.C. § 101 (a) defines "maintenance" as the preservation of the entire highway, including surface, shoulders, roadsides and such traffic-control devices as are necessary for its safe and efficient utilization.

2. Facts in the Case

The William Penn Parkway East, as involved in the instant litigation, is a fifty per cent (50%) federal participation highway designed, constructed, and maintained in accordance with the statutory scheme as set forth above. The federal Bureau of Public Roads became involved in the William Penn Parkway East project from its conception in 1941. (R, 91a-93a.) Between 1943 and 1946, representatives of the Bureau of Public Roads participated in conferences and discussions with officials of the Department of Highways of the Commonwealth of Pennsylvania and the engineering firm of Michael Baker, Jr., which included on-the-site reviews and examination of preliminary plans and sketches together with supporting information. (R, 200a.) Thereafter, additional studies were made by consulting engineer George S. Richardson of Pittsburgh, Pennsylvania. Again, meetings and conferences were held and attended by representatives of the Richardson firm, the Department of Highways, and employees of the Bureau of Public Roads. During these conferences, the attempt was made to con-

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sider federal objections, requirements, and specifications, so that a design would be submitted to the federal government (and the Commonwealth of Pennsylvania) that would in effect have advance approval. (R, 98a-99a.) In addition, the plans and typical cross-sections for the project were reviewed by the Bureau of Public Roads on various levels. (R, 200a-201a.) This review included a review of proposed design, including slope cuts and proposed benching treatment (R, 201a)[3] although during this period no qualified agents or employees of the federal government inspected the core borings that had been made in the hillside, conducted tests of the stabiilty of the rock structures, consulted experts, or even discussed the nature and conformation of the hillside and any dangers it might present. (R, 94a-96a.)

Early in 1954, the plans were submitted to the Bureau of Public Roads for final approval. The project was approved on March 26, 1954, for construction on a fifty-fifty basis with the Commonwealth of Pennsylvania. A project agreement was approved on May 7, 1954, and was signed July 23, 1954. (R, 148a-156a.)

Employees of the Bureau of Public Roads (unfortunately not familiar with soil or rock structures in any expert sense; R, 24a, 29a, 37a) inspected the project at monthly intervals during construction. (R, 28a, 38a, 72a.) If at any time during the course of construction the federal employees had become dissatisfied with the

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3. Petitioners' expert engineer has stated that incorrect placing of the bench contributed to the hazardous situation presented by the undercutting of a rock layer on the hillside. Affidavit of Elio D'Appolonia, R, 172a.

construction work or conditions that were revealed during the course of construction, they could have issued "stop" orders and thus cut off federal funds until such conditions were corrected. This would have effectively halted construction at that point. (R, 144a-116a.)

The highway was opened to public vehicular traffic approximately in January, 1957. It was completed on June 28, 1957, and was inspected by the Bureau of Public Roads on July 10, 1957. (R, 186a.) An inspection, to ascertain whether maintenance was proper, was made in October, 1958. Sloughage was a persistent problem, but the attempted removal of sloughage from the hillside by state maintenance crews (R, 194a-197a) may well have constituted faulty maintenance. (Affidavit of Elio D'Appolonia, R, 171a.)

On September 21, 1958, between 9:30 and 10:00 P.M., Leopold W. Mahler was operating an automobile in which Helen E. Mahler and Bertha Ebertsheim were passengers. The Mahler car was proceeding in a westerly direction on the William Penn Parkway East, in the extreme right hand lane, at a speed of approximately thirty-five miles per hour. When the Mahler automobile had reached a point approximately five hundred feet West of the Bates Street Exit of the Parkway, in the City of Pittsburgh, and was proceeding toward the ramp leading onto the Boulevard of the Allies, a large rock, together with other smaller rocks, earth, and debris, suddenly and without warning fell or rolled down from the hillside (situated immediately on the right side of the roadway) directly in front of or onto the front end of the Mahler automobile. Leopold W. Mahler, Helen E. Mahler and Bertha Ebertsheim were seriously injured in the resulting impact.

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3. History of the Instant Litigation

On June 9, 1959, your petitioners brought this action under the Federal Tort Claims Act in the United States District Court for the Western District of Pennsylvania to recover for personal injuries and property damage sustained in the automobile accident occurring on September 21, 1958, when plaintiffs' automobile struck, or was struck by, a large boulder while travelling on the William Penn Parkway East in Pittsburgh. An amendment to plaintiffs' complaint was filed on July 5, 1960. (R, 5a-7a, 135a-137a). Your petitioners asserted that the Federal Highway Program imposed a duty, owed to the travelling public, on the United States to make sure that the segment of the road on which the accident occurred was designed, constructed, and maintained properly. They contended that the United States failed to fulfill its duty in three respects: (1) in approving defective plans for the project submitted by the Pennsylvania Department of Highways on the basis of planning conferences held jointly with federal authorities who did not inspect core borings and rock samples, were not in any event qualified to evaluate them, and did not engage experts to review the nature and composition of the hillside prior to construction; (2) in failing to discover faulty construction when inspecting during the course of construction; and (3) alternatively (a) in failing to make inspections after construction was completed which would have revealed defective maintenance by the Commonwealth of Pennsylvania or (b) in making such inspections that would or should have revealed the seriously defective condition of the roadway, and in failing to warn of the defects or to pre-

vent users of the highway from travelling on dangerous portions thereof.

The United States thereupon moved for summary judgment on the dual grounds that: (1) your petitioners' claim is barred by the Discretionary Function Exception of the Tort Claims Act[4] and (2) that Section 48 of the Federal Aid Road Act excepts the United States from liability. (R, 122a).

After argument, the district court granted the government's motion for summary judgment, holding (R, 181a-183a) that the federal government was simply a donor of funds and as such could not owe a duty to highway users under Pennsylvania law, and hence could not be liable under the Federal Tort Claims Act. For authority, the court cited Section 288 of the Restatement of Torts. (R, 182a.)

The Court of Appeals for the Third Circuit affirmed. The court accepted your petitioners' contention that (leaving aside the Discretionary Function Exception of the Tort Claims Act, 28 U.S.C. § 2680 (a)) under the law of Pennsylvania the United States must be deemed to have breached its duty to plaintiff if such a duty were in fact owed. The court then stated that whether or not a duty was owed to individuals who used a Federal Aid Highway would depend upon the legislative history leading to the passage of the Federal-Aid Road Act of 1916 and various amendments thereto. The court then concluded that, on the basis of its examination of the pertinent legislative history, Congress did not intend to establish a duty to individuals but was concerned

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4. 28 U.S.C. § 2680 (a), App., *infra*, p. 36.

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only to make sure that federal funds were effectively employed and not wasted. Petitioners' state court analogies did not apply because in the state court cases relied upon by petitioners, the purpose of inspections was to provide for the safety of users of the involved structures.

The court further stated that Section 12 of the Federal Aid Highway Act of 1938, App., *infra*, p. 34, for the first time specifically directed that the safety of a highway must be considered as a factor in passing on submitted highway designs. But this concern involved only governmental activity pertaining to planning and design, and hence was barred by the Discretionary Function Exception to the Federal Tort Claims Act, 28 U.S.C. Section 2680 (a).

REASONS FOR GRANTING THE WRIT

This is a case of first impression in the United States[5] wherein the court of appeals has held that the United States owes no actionable duty to users of a federal participation highway arising from the undertaking and negligent performance of construction and maintenance inspections, despite the fact that a private person would be liable in Pennsylvania under like circumstances. The court has further held that a portion of petitioners' claim which is based on the alleged (and for present purposes admitted) failure of the United States to utilize experts or employ qualified personnel for operational activities performed on the levels of planning and design, is barred by the Discretionary Function Exception to the Federal Tort Claims Act, 28 U.S.C. § 2680 (a), under the authority of *Dalehite v. U. S.*, 346 U.S. 15, 97 L. Ed. 1427 (1953.)

The instant case, arising from an attempted novel application of the Federal Tort Claims Act to impose liability upon the United States by virtue of federal aid to highways legislation, raises three issues of great importance in determining and clarifying the tort liability of the United States: (1) whether the undertaking of inspections, followed by inadequate or negligent performance thereof, may give rise to a legal duty owed to those who rely on those inspections; (2) whether liability is imposed on the United States because a private person would be liable for the negligent perform-

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5. Although perhaps foreseen in other litigation, *Big Head v. U.S.*, 166 F. Supp. 510, 514-515 (D. Mont., 1958.)

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ance of like activities under state law; and (3) whether the Discretionary Function Exemption excepts the United States from liability for operational activities performed on the level of planning and design.

In each of these three areas, we believe that this decision is in conflict with the decisions of other circuit courts and with Supreme Court precedent.

1. The Supreme Court has held, in *Indian Towing Co. v. U.S.*, 350 U.S. 61, 100 L. Ed. 48 (1955) that once the United States exercises its discretion in undertaking to perform a function or activity (operation of warning light on Chandeleur Island; allegations of faulty and inadequate inspections, failing to repair, and failing to warn, as a result of which a tug was grounded) and engenders reliance on the proper conducting of that activity, it must use due care to make sure that the undertaking is being properly carried out, and, if there is any defect or impairment, to discover that fact and to repair or give warning of improper or inadequate functioning. ". . . it is hornbook tort law that one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good samaritan' task in a careful manner."[6]

In *Rayonier v. U. S.*, 352 U.S. 315, 1 L. Ed. 2d 354 (1957) this court held that an action might be maintained against the United States (providing state (Washington) law would impose liability under similar circumstances) where the U. S. Forest Service undertook (1) to inspect and supervise the operation of trains

6. 350 U.S. 61, 64, 65.

by a private railroad on a *privately maintained* railroad right-of-way, and (2) to police the right-of-way itself to make sure that the railroad was maintaining it properly.

The Fifth Circuit, in *Fair v. U. S.*, 234 F. 2d 283, 294 (1956) in countering the argument by the United States that there could be no liability to individuals arising from failing properly to examine, treat, observe, and retain custody over an Air Force Captain who had homicidal tendencies, and from failing to warn of the dangers presented by those tendencies when the Captain was released, held that the United States owed a duty to perform activities with due care once those activities were undertaken, and that the duty was owed to "the public and the individuals who compose it" as measured by the same rule as the local law applied to a private person under like circumstances.

In *Somerset Seafood Co. v. U. S.*, 193 F. 2d 631 (4th Cir., 1951) the Fourth Circuit held the United States liable for negligence in marking a wreck sunk by the United States under the Wrecks Acts, 14 U.S.C. § 86, 33 U.S.C. §§ 409-414. The obligations of the United States (additional to the duties of owners, masters, and pilots of their own vessels) arise when the United States exercises its discretion in assuming the responsibility of marking a wreck. *Cornell Steamboat Co. v. U. S.*, 138 F. Supp. 16 (S.D.N.Y., 1956) *aff'd.* 247 F. 2d 275 (2nd Cir., 1957) specifically extends the *Somerset Seafood* rationale to a situation wherein the U. S. Coast Guard undertook to remove but failed to mark the wreck of a barge that was not government-owned.

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Other circuit court decisions, including the First, Fifth, Sixth, Ninth, Tenth and D.C. Circuits, arising both prior and subsequent to the *Indian Towing* and *Rayonier* decisions, have correspondingly imposed a duty to those members of the public within the area of foreseeable risk, injured because of negligent performance of operational governmental activity, once undertaken, and who rely or have a right to rely on proper exercise of their responsibilities by the involved governmental personnel: *Eastern Air Lines v. Union Trust Co.* 221 F. 2d 62 (D.C. Cir., 1955) *cert. granted* and case *aff'd. per curiam sub nom. U.S. v. Union Trust Co.*, 350 U.S. 907, 100 L. Ed. 296 (1955); *U.S. v. Grigalauskas*, 195 F. 2d 494 (1st Cir., 1952); *Costley v. U.S.*, 181 F. 2d 723 (5th Cir., 1950); *Pierce v. U.S.*, 142 F. Supp. 721 (E. D. Tenn., 1955) *aff'd.* 235 F. 2d 466 (6th Cir., 1956); *Builders Corp. of America v. U.S.*, 259 F. 2d 766 (9th Cir., 1958.); *Air Transport Associates v. U.S.*, 221 F. 2d 467 (9th Cir., 1955); *U.S. v. Gray*, 199 F. 2d 239 (10th Cir., 1952)[7].

The court below conflicts with the foregoing line of circuit court decisions because it believed that the legislative history of the original Federal-Aid Highway Act of 1916, indicated that Congress was interested in providing inspections only to make sure that federal funds were effectively employed and not wasted (App., *infra*, p. 55) although the decision concedes that, if in

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7. *Richards v. U.S.*, 285 F. 2d 521 (10th Cir., 1960) *aff'd. Richards v. U.S.*, 369 U.S. 1, 82 Sup. Ct. 585 (1962), although decided on other grounds, attempted to impose liability on the United States for negligent performance of supervisory activities of Civil Aeronautics personnel over *private airlines*.

fact construction and maintenance inspections were safety inspections, a duty would be owed to petitioners that might well give rise to a cause of action. (App., *infra*, pp. 56-58.)

But the legislative history as set forth in the Opinion of the Court below (App., *infra*, pp. 46-55) indicates that Congress was concerned about the use to which the fund was to be put in road construction and was not protecting the fund itself,[8] and confirms our converse conclusion that "effective employment" of federal funds necessarily demands that safe highways be constructed and maintained.[9] The Bureau of Public Roads has come to the same conclusion, finding authority for its requirement that maintenance inspections be safety inspections in the maintenance-inspection provisions of Section 14 of the Federal Highway Act of 1921 (42 Stat. 212, incorpo-

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8. Cf. *U.S. v. Neustadt*, 366 U.S. 696, 6 L. Ed. 2d 614 (1961) and *Weinstein v. U.S.*, 244 F. 2d 68 (3rd Cir., 1957) *cert. den.* 335 U.S. 868 (1959) as examples of situations where the United States must maximize and protect federal funds or revenue.

9. "The highway commission of the state . . . submit[s] the plans; they designate the road to be built, its location, and the estimate for the improvement, to the Secretary of Agriculture; and while I regret, Mr. President, that we found it necessary to do so, we had to lodge the veto power somewhere, and we thought it best to give to the Secretary of Agriculture the power to say: 'That is not a proper road to be built; it is not in a proper place; *the construction of it is not what it ought to be;* the estimate of cost is too high; and I am not, as the representative of the government of the United States, willing to approve it and put up half the money for it.' That is the proposition." 53 Cong. Rec. 6429 (1916) (Remarks of Senator Bankhead.) Emphasis supplied.

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rating pertinent provisions of the Federal-Aid Road Act of 1916) that we have set forth below. (App., *infra*, pp. 31-34.) Policy and Procedure Memorandum 21-11.1, Section 3, Authority. (App., *infra*, pp. 37, 38.)

Congress itself has clearly indicated that it intended maintenance inspections to be safety inspections by clarifying the definition of "maintenance" in its 1958 codification of federal aid to highways legislation, as follows:

> "The term 'maintenance' means the preservation of the entire highway, including surface, shoulders, roadsides, structures, and such traffic-control devices as are necessary for its *safe and efficient utilization.*" (Emphasis supplied.) 72 Stat. 885, 23 P.S. § 101 (a).

Although this codification was enacted only one month prior to the accident which is the basis for this suit, and subsequent to many governmental activities alleged to be negligent, Congress had made it quite clear that the 1958 codification made no substantive changes in the prior law.[10]

The court below finds support for its contention that any duty owed by the United States was owed only to itself in *U.S. v. Neustadt*, 366 U.S. 696, 6 L. Ed. 2d 614 (1961.) But the *Neustadt* case involved protection of a federal fund (rather than a project for which the fund was used) in a situation where no state law was presented to this Court, and wherein this Court found

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10. See 104 Cong. Rec. 12396 (1958) (Remarks of Representatives Fallon and Gross); S. Rep. No. 1928, H. Rep. No. 1938, 85th Cong., 2d Sess. (1958.)

post-Tort Claims Act legislative declarations that Congress intended only to protect a fund and did not intend to impose a duty to individuals.[11] As heretofore stated, the present case presents the strongest possible contrast to the *Neustadt* situation, since a post-Tort Claims Act declaration of legislative intent indicated that maintenance inspections were (and by implication had always been) in fact designated to promote the safe and efficient utilization of highways (with a concomitant duty to highway users). 23 U.S.C. § 101 (a), definition of "maintenance."

In addition, Congress had expressed a concern with safety pertinent to the case at bar prior but close in time to passage of the Federal Tort Claims Act, when it enacted the Federal-Aid Highway Act of 1944[12] and the Federal Aid Highway Act of 1938.[13]

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11. *U.S. v. Neustadt,* 366 U.S. 696, 709. The court below concedes that the legislative history in the instant case is "not so explicit as that cited by Mr. Justice Whittaker in *Neustadt*" (App., *infra,* p. 55, n. 8.) That legislative history is also irrelevant to the question of governmental liability under the Federal Tort Claims Act. Applying the *Neustadt* rationale to the instant case would require your petitioners to demonstrate that Congress expressed an intent to impose a duty to individuals approximately thirty years prior to passage of the Tort Claims Act. In 1916 Congress, imbued with the doctrine of governmental immunity, would not even have contemplated tort liability to individuals.

12. 58 Stat. 838, now 23 U.S.C.A. § 109 (d) (Supp. 1961), App., *infra,* pp. 34, 35.

13. 52 Stat. 636, now 23 U.S.C.A. § 109 (a) (Supp. 1961) App., *infra,* p. 34.

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Section 12 of the 1944 Act provides that the Public Roads Administration must concur in the location, form and character of informational, regulatory, and warning signs, and the Commissioner of Public Roads is expressly "directed to concur only in such installations as will promote the safe and efficient utilization of the highways." The foregoing statutory directive is incorporated into Bureau of Public Roads maintenance requirements and responsibilities. Policy and Procedure Memorandum 21-11.1, Section 3(c) (App., *infra*, p. 38.) The court below apparently considered the foregoing statutory provision collateral to the issues in the case (App., *infra*, p. 57, n. 10) but it is directly and pertinently related to your petitioners' allegations of failure to warn.[14] *Indian Towing Co. v. U.S.*, 350 U.S. 61, 64, 65.

The court below concedes that the acts of negligence alleged (and assumed to be fact) would constitute a breach of the 1938 Act, requiring that the Secretary of Agriculture "shall *approve only* such methods of bidding and such *plans and specifications of highway construction for the type or types proposed as will be* effective in securing competition and *conducive to safety*, durability, and economy of maintainance." (Emphasis supplied by the Opinion of the Third Circuit Court, App., *infra*, p. 59.) The court then holds that the introduction of safety and a corresponding duty to individuals arising under Section 12 of the Act of 1938 operates only on the level of planning and design; it does not carry the breach of duty into construction and maintenance

14. Complaint, R., 6a; Amendment to Complaint, R., 136a, 137a.

inspections. But when the nature of those inspections is considered, they must necessarily also be concerned with safety.[15]

The *Neustadt* case, even if correctly applied to the case at bar regarding Congressional legislative intent, nevertheless does not control the conflict between circuits presented here precisely because the test of liability on the part of the United States under the Federal Tort Claims Act is whether a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred,[16] not whether Congress intended to impose liability to individuals in

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15. Whether inspections during construction and maintenance are labeled "safety inspections" or inspections "to determine whether federal money is spent wisely" (the terms are synonymous) the inspections do nothing more nor less than determine whether or not a road is first being constructed, and then, being maintained, according to previously determined (here with the active approval, cooperation, and participation of the Bureau of Public Roads) design criteria. These inspections simply insure that the road during and after construction continues to meet the previously built-in safety requirements. (Section 1 of the Act of August 27, 1958, P.L. 85-767, 72 Stat. 896, now 23 U.S.C.C. § 116 (c), (Supp. 1961) discusses the supervisory responsibilities of the United States over maintenance of projects "constructed under the provisions of this Chapter," which of course includes Section 12 of the Act of 1938.) This supervisory activity of federal inspectors is identical in purpose, scope, and function with the activities of private inspectors in our state court analogies. *Infra*, p. 24.

16. 28 U.S.C. § 1346 (b); *Indian Towing Co. v. U.S.*, 350 U.S. 61, 100 L. Ed. 48 (1955); *Rayonier v. U.S.*, 352 U.S. 315, 1 L. Ed. 2d 354 (1957.)

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enacting the statutes giving rise to the pertinent governmental activities. Liability is imposed upon the United States by operation of the Federal Tort Claims Act itself in areas where the federal government was previously immune.[17] Should there be a conflict between congressional legislative history and applicable state law, state law must determine governmental liability.

2. The court below recognized that "under the law of Pennsylvania the United States must be deemed to have breached its duty to plaintiffs." (App., *infra*, p. 43.)[18] Nevertheless, the court states that your petitioners cannot maintain this action, solely on the ground that the analogous state inspections are safety inspections, and federal inspections are purportedly for the limited purpose of safeguarding the federal government's financial interest.[19] This holding conflicts with the plain language of the Federal Tort Claims Act, § 1346 (b); Supreme Court precedent in such Supreme Court cases as *Indian Towing Co. v. U.S.*, 350 U.S. 61, 100 L. Ed. 48 (1955); *Rayonier v. U.S.*, 352 U.S. 315, 1 L. Ed. 2d 354 (1957); and *Richards v. U.S.*, 369 U.S. 1, 82 Sup. Ct. 585 (1962); and such circuit court decisions as *Winston*

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17. See H.R. No. 1287, 79th Cong., 1st Sess. 3 (1945.)

18. Recognizing that this Court will ordinarily accept the determination of courts of appeals on questions of state law, *Richards v. U.S.*, 369 U.S. 1, 16, n. 35, in the instant case state law is admittedly analogous, and your petitioners' position is not affected thereby. What is involved in the instant case is the circuit court's misinterpretation of *federal* law by finding the alleged difference in purpose set forth immediately hereinafter, when in fact no such difference in purpose exists.

19. App., *infra*, p. 55.

v. U.S., ... F. 2d .... (2nd Cir., 1962, *aff'd. on rehearing* .... F. 2d (1962) and *Muniz v. U.S.*, ... F. 2d .... (2nd Cir., 1962), *aff'd on rehearing* ....F. 2d .... (1962) holding that the imposition of liability upon an individual for negligent performance of like activities under state law is itself sufficient to impose liability upon the United States under the Federal Tort Claims Act.[20]

The court below errs in declaring that federal inspections are not safety inspections, in view of pronouncements by the Bureau of Public Roads itself to the contrary.

Bureau of Public Roads Policy and Procedure Memorandum 21-11. (App., *infra,* p. 37) states as follows:

"2. DEFINITION OF MAINTENANCE

"a. Section 2 of the Federal Highway Act of 1921 contains the following definition of maintenance:

" 'The term 'maintenance' means the constant making of needed repairs to preserve a smooth surfaced highway.'

"b. For the purpose of evaluating maintenance performance, the foregoing definition is construed to mean the preservation of the entire highway, including surface, shoulders, medians, roadsides, structures,

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20. Petitions for Certiorari in *Winston v. U.S.* and *Muniz v. U.S.* may be presented to this Court by the United States concurrently with our petition in the instant case. These cases present a much broader application of the Federal Tort Claims Act to the "duty" concept and to state law analogies than is demonstrated by the opinion of the court below.

and such traffic service and control devices as are necessary for its *safe and efficient utilization.*" (Emphasis supplied.)[21]

It is the very language of part (b) of the foregoing definition which is incorporated in the subsequent definition of "maintenance" found in the 1958 codification of Federal-Aid-to-Highways legislation, 72 Stat. 885, 23 U.S.C.A. § 101 (a) (Supp. 1961.) The foregoing definition thus expresses what had been the prior Congressional intent and the prior operational responsibilities of Bureau of Public Roads maintenance inspectors.

The same Memorandum, in section 3 (c), carries the safety requirements for placing signs, signals, and other traffic control devices as set forth in Section 12 of the Federal-Aid Highway Act of 1944 (App., *infra*, pp. 34, 35) onto the level of maintenance inspections.

In accordance with the foregoing statutes and declarations of policy and procedure, deposition testimony of the Division Engineer in the Pennsylvania division, Bureau of Public Roads (R., 96a, 117a-118a) established that, in practice, traffic service is considered to be the primary function served in building any road; federal employees endeavor to design highways that are reasonably safe for public use, and subsequent inspections are made to see that the work is carried out in accordance with the plans and specifications, to see

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21. Although the Third Circuit opinion cites the foregoing Memorandum in another connection, its error is not finding that federal inspections are safety inspections may be the fault of counsel for your petitioners, who did not present the above Memorandum to the court for its consideration.

that federal funds are properly expended for the benefit of highway travelers, and to accomplish a properly constructed highway that would be functional, useful, and safe for users of the road.[22]

When federal inspections are shown to be in fact safety inspections, any supposed difference between the instant case and your petitioners' state law analogies disappears.[23] And the concession on the part of the Third Circuit that, if safety is a factor in inspections, a duty is owed to users of the involved highway, (App., *infra,* pp. 58, 59) further requires that your petitioners

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22. This concern for safety is enhanced, not negated, by the statement that federal funds should be wisely spent.

23. Recognizing that the responsibilities of designing, constructing, operating, and maintaining Federal Aid Highways rests primarily on the states, and federal responsibilities are primarily cooperative and supervisory (involving the use of its admitted veto power, exercisable insofar as federal funds are desired by the state, App., *infra,* p. 46, to police the states and make sure they properly carry out their duties and functions) Pennsylvania law may well be unique in imposing liability under like circumstances. But in Pennsylvania, liability, either primary or secondary, may be imposed because of the mere undertaking of maintenance inspections or the failure properly to supervise or "police" the activities of parties who may be additionally or primarily responsible for construction or maintenance. *Bollin v. Elevator Construction and Repair Co.,* 361 Pa. 7, 63 A. 2d 19 (1949); *Pittsburgh Steel Co. v. Patterson-Emerson-Comstock, Inc.,* 404 Pa. 53, 171 A. 2d 185 (1961); *Builders Supply Co. v. McCabe,* 336 Pa. 322, 77 A. 2d 368 (1951); *Bisson v. John B. Kelly, Inc.,* 314 Pa. 99, 140 Atl. 139 (1934.)

be permitted to go to trial.[24] We submit that the decision of the court below is unique in holding that your petitioners do not have the right to sue despite the admitted existence of applicable governing state law analogies.[25]

3. The circuit court held that the Discretionary Function Exception of the Federal Tort Claims Act[26] applied to that portion of governmental activity giving rise to a duty to the public under section 12 of the Federal Aid Highway Act of 1938, App., *infra*, p. 59. But the acts complained of, even on the levels of planning and design, are not discretionary functions such as deciding where to place a highway, projecting future load carrying capacity, etc. They simply allege the failure of the federal government to employ or utilize personnel who, in reviewing core borings and rock samples, have the necessary education and training to even comprehend possible problems imposed by a massive cut through a hillside, and the related failure to employ or consult out-

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24. If federal inspections are even in part safety inspections, and a duty is thereby owed to highway users, liability is imposed under the rule of the Restatement of Torts, § 286. (Compare with Restatement, §288, and note Pennsylvania annotations under both Sections and § 349.)

25. Even the *dissenting* opinion (on rehearing) in *Winston v. U.S.*, ... F. 2d .... (2nd Cir., 1962) states that "It would seem that all states recognize private liability in almost all situations in which a person may be injured as a result of the federal Government's 'operational negligence', so that the Government will also be liable."

26. 28 U.S.C. § 2680 (a), App., *infra*, p. 36.

side experts.[27] This is not an exercise of discretion, but the failure of the Bureau of Public Roads to achieve the ability to operate properly on the level of planning and design, and is thus not barred by *Dalehite v. U.S.*, 346 U.S. 15, 97 L. Ed. 1427 (1953).

But even assuming that *Dalehite* would bar a portion of your petitioners' claim, the decision of the court below conflicts with numerous post-*Dalehite* circuit decisions recognizing both (1) that there is a measure of discretion in "operational" activities, and (2) that operational activities may occur on the level of "planning and design," and expressly distinguishing *Dalehite* on both grounds. *Cornell Steamboat Co. v. U.S.*, 138 F. Supp. 16 (S.D.N.Y., 1956) *aff'd.* 247 2d 275 (2nd Cir., 1957); *Fair v. U.S.*, 234 F. 2d 288 (5th Cir., 1956); *Pierce v. U.S.*, 235 F. 2d 466 (6th Cir., 1956); *American Exchange Bank of Madison, Wis. v. U.S.*, 257 F. 2d 938 (7th Cir., 1958); *Dahlstrom v. U.S.*, 228 F. 2d 819 (8th Cir., 1956). Following that more liberal trend,[28] a district court has held that a claim based on facts admittedly analogous to those presented here should not be barred by the Discretionary Function Exception since the al-

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27. Amendment to Complaint, R., 135a. A failure to utilize qualified personnel is also evidenced regarding federal construction and maintenance inspectors. (R, 24a, 29a, 37a, 39a.) Petitioners' allegations in this regard (Amendment to Complaint, R, 136a) are similar to those held to sustain a cause of action in *Bollin v. Elevator Construction and Repair Co.*, 63 A. 2d 19, 20 (1949).

28. See Hunt, "The Federal Tort Claims Act: Sovereign Liability Today," *Mil. L. Rev.*, April 1960 (DA Pam 27 100-8, 1 Apr. 60) p. 1

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leged activities, even though on the level of planning and design, are in fact operational.[29]

The aforesaid conflict between circuits seems to arise because of conflicting circuit court opinions as to whether or not *Indian Towing Co. v. U.S.*[30] and *Rayonier v. U.S.*[31] imply a change of attitude on the part of this Court regarding the proper application of the Discretionary Function Exception.[32] The instant case has brought that conflict into sharp focus.

An additional conflict arises from the fact that the court below has affirmed the granting of the United States' motion for summary judgment on the question of whether a portion of petitioners' claim is barred by the Discretionary Function Exception. Whether or not the alleged activities of employees of the United States are in fact discretionary, and the extent of the exercise of discretion, have been held to be questions of fact, which must await a trial for determination. *Stewart v. U.S.*, 199 F. 2d 517 (7th Cir., 1952); *Guy F. Atkinson v. Merritt, Chapman & Scott Corp.*, 126 F. Supp. 406 (N.D. Cal.,

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29. *Jemison v. The Duplex*, 163 F. Supp. 947 (S.D. Ala., 1958.) The court below expressly distinguishes this case on the authority of *Dalehite* (App., *infra*, p. pp. 60, 61, n. 13), ignoring the trend of post-*Dalehite* circuit decisions.

30. 350 U.S. 61, 100 L. Ed. 48 (1955)

31. 352 U.S. 315, 1 L. Ed. 2d 354 (1957)

32. Compare the language of *Fair v. U.S.*, 234 F. 2d 288, 293 (5th Cir., 1956) and *American Exchange Bank of Madison, Wis. v. U.S.*, 257 F. 2d 938, 941 (7th Cir., 1958) with that of the court below. (App., *infra*, p. pp. 60, 61, n. 13.) See 70 Harv. L. Rev. 829, 892-896 (1957.)

1954.) Your petitioners should not have the burden of showing that their claim does not fall within one of the statutory exceptions to the Federal Tort Claims Act; rather, the burden should be on the government to plead and prove the exception like any affirmative defense. See *Boyce v. U.S.*, 93 F. Supp. 866, 868 (S.D. Iowa, 1950); 67 Harv. L. Rev. 1280 (1954.)

4. Application of the Federal Tort Claims Act to Federal Aid to Highways legislation has never previously been attempted. Yet the legal principles involved are based on hornbook tort law, as expressed in federal and state (Pennsylvania) cases. *Indian Towing Co. v. U.S.*, 350 U.S. 61, 100 L. Ed. 2d 48 (1955); *Bollin v. Elevator Construction & Repair Co.*, 361 Pa. 7, 63 A. 2d 19 (1949); *Bisson v. John B. Kelly, Inc.*, 314 Pa. 99, 140 Atl. 139 (1934). And the involvement of the federal government in activities pertaining to commerce has already led to the imposition of Tort Claims Act liability for negligent operations in the air[33] and on the sea.[34]

While possibly providing the right to sue in the instant case might appear to permit other litigation arising from similar factual circumstances (particularly with the ever-increasing vehicular traffic and new road construction, together with all the indicia of federal

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33. *Eastern Air Lines v. Union Trust Co.*, 211 F. 2d 62 (D.C. Cir., 1955); *cert. granted* and case *aff'd. per curiam sub. nom. U.S. v. Union Trust Co.*, 350 U.S. 907 (1955); *Dahlstrom v. U.S.*, 228 F. 2d 819 (8th Cir., 1956); *Aero Enterprises, Inc. v. American Flyers, Inc.*, 167 F. Supp. 239 (N.D. Tex., 1958.)

34. *Cornell Steamboat Co. v. U.S.*, 247 F. 2d 275 (2nd Cir., 1957); *Somerset Seafood Co. v. U.S.*, 193 F. 2d 631 (4th Cir., 1951).

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participation, engendering reliance thereon[35]) two factors arise which serve effectively to limit the government's area of responsibility: (1) state law must provide a favorable context for the imposition of liability under the Federal Tort Claims Act; and (2) a claimant must show physical injury arising from a specific act (or series of acts) of provable negligence.[36]

The novelty of the present attempted application of the Federal Tort Claims Act is no ground for denying the right to sue[37] especially where the case does not fall within any exemptions to the Act.[38] As was recently stated in *Winston v. U.S.*, ... F. 2d .... (2d Cir., 1962, on rehearing *en banc*) "The care with which Congress detailed the express exclusions from the coverage of the Act of those situations in which the right of recovery was considered undesirable (H. Rep. No. 1287, supra, at 5-6 (1945)), leaves no room for the exception of additional situations which would otherwise be covered by the statute." The foregoing statement should be particularly true where the claimant's right to sue is foreclosed prior to trial.

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35 such as the distinctive route markings of Interstate System Highways, and the advertising of federal participation by posting signs during construction (Pub. L. 86-647, §8 (f), 74 Stat. 525 (1960), 23 U.S.C.A. §114 (a) (Supp. 1961.)

36. An excellent discussion of policy factors important in determining when an injured individual should be compensated out of public funds for negligent acts performed by government employees in the public interest is found in James, "Tort Liabiltiy of Governmental Units and Their Officers," 22 *U. of Chi. L. Rev.* 610, 653-654 (1955.)

37. *Rayonier v. U.S.*, 352 U.S. 315, 319 (1957)

38. *Rayonier v. U.S., supra*, 352 U.S. 315, 320.

CONCLUSION

It is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

ROBERT A. COHEN
GOLDSTOCK, SCHWARTZ,
COHEN AND SCHWARTZ

September, 1962

APPENDIX

Statutes and Regulations Involved

1. The relevant provisions of the Federal Highway Act of 1916 (39 Stat. 355) as amended by the 1921 Act (42 Stat. 212) and others are as follows:

23 U.S.C. 12 (1952 ed.) in pertinent part provided:

> Any State having complied with the provisions of this chapter, and desiring to avail itself of the benefits thereof, shall by its State highway department submit to the Secretary of Commerce project statements setting forth proposed construction or reconstruction of any primary or interstate or secondary or intercounty highway therein. If the Secretary of Commerce approves the project, the State Highway Department shall furnish to him such surveys, plans, specifications, and estimates therefor as he may require; items included for engineering, inspection, and unforeseen contingencies shall not exceed 10 per centum of the total estimated cost of its construction.
>
> When the Secretary of Commerce approves such surveys, plans, specifications, and estimates, he shall notify the State Highway Department and immediately certify the fact to the Secretary of the Treasury. The Secretary of the Treasury shall thereupon set aside the share of the United States payable under this chapter on account of such projects, which shall not exceed 50 per centum of the total estimated cost thereof.

* * * * * * *

Statutes and Regulations Involved.

23 U.S.C. 13 (1952 ed.) in pertinent part provided:

The construction and reconstruction of the highways or parts of highways under the provisions of this chapter, and all contracts, plans, specifications, and estimates relating thereto, shall be undertaken by the State highway departments subject to the approval of the Secretary of Commerce. The construction and reconstruction work and labor in each State shall be done in accordance with its laws and under the direct supervision of the State highway department, subject to the inspection and approval of the Secretary of Commerce and in accordance with the rules and regulations pursuant to this chapter.

* * * * * * *

23 U.S.C. 14 (1952 ed.) in pertinent part provided:

When the Secretary of Commerce shall find that any project approved by him has been constructed or reconstructed in compliance with said plans and specifications, he shall cause to be paid to the proper authorities of said State the amount set aside for said project.

The Secretary of Commerce may, in his discretion, from time to time, make payments on such construction or reconstruction as the work progresses, but these payments, including previous payments, if any, shall not be more than the United States pro rate of the value of the labor and materials which have been actually put into such construction or reconstruction in conformity to said

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plan and specifications. The Secretary of Commerce and the State highway department of each State may jointly determine at what time and in what amounts payments as work progresses shall be made under this chapter.

* * * * * * *

23 U.S.C. 15 (1952 ed.) in pertinent part provided:

It shall be the duty of the State to maintain any highway within its boundaries after construction under the provisions of this chapter. If at any time the Commissioner of the Bureau of Public Roads shall find that any such highway in any State is not being properly maintained he shall call such fact to the attention of the highway department of such State and if within ninety days after receipt of such notice said highway has not been put in a proper condition of maintenance then the Commissioner of Public Roads shall withhold approval of further projects in such State until such highway has been restored to a proper condition of maintenance: . . . .

* * * * * * *

23 U.S.C. 48 (1952 ed.) in pertinent part provided:

To maintain the roads constructed under the provisions of this title shall be the duty of the States, or their civil subdivisions, according to the laws of the several States. If at any time the Secretary of Commerce shall find that any road in any State constructed under the provisions of this title is not being properly maintained, he shall give notice of such fact to the highway department of

such State and if within four months from the receipt of said notice said road has not yet been put in a proper condition of maintenance, then the Secretary of Commerce shall thereafter refuse to approve any project for road construction in said State, or the civil subdivision thereof, as the fact may be, whose duty it is to maintain said road until it has been put in a condition of proper maintenance.

2. The relevant provisions of Section 12 of the Federal Aid Highway Act of 1938, 52 Stat. 636, are as follows:[2]

> Hereafter the Secretary of Agriculture shall approve only such methods of bidding and such plans and specifications of highway construction for the type or types proposed as will be effective in securing competition and conducive to safety, durability, and economy of maintenance.

3. Relevant provisions of Section 12 of the Federal-Aid Highway Act of 1944, 58 Stat. 838, now 23 U.S.C.A. § 109 (d) (Supp. 1961), are as follows:

> On any highway project in which Federal funds hereafter participate, or on any such project constructed since December 20, 1944, the location, form and character of informational, regulatory and warning signs, curb and pavement or other markings, and traffic signals installed or placed by any public authority or other agency, shall be subject to the approval of the State highway department with

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2. Codified in the 1952 edition of the United States Code as amended, at 23 U.S.C. § 8a; now found at 23 U.S.C.A. § 190 (a) (Supp. 1961).

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the concurrence of the Secretary, who is directed to concur only in such installations as will promote the safe and efficient utilization of the highways.

4. The relevant provisions of Pub. L. 85-767, § 1, Aug. 27, 1958, 72 Stat. 885, 23 U.S.C.A. § 101 (a) (Supp. 1961) are as follows:

> The term "maintenance" means the preservation of the entire highway, including surface, shoulders, roadsides, structures, and such traffic-control devices as are necessary for its safe and efficient utilization.

5. Relevant provisions of the Federal Tort Claims Act, 28 U.S.C. 2680 (a), 2674, and 1346 (b), 60 Stat. 842 (1946) are as follows:

28 U.S.C. 1346

UNITED STATES AS DEFENDANT

* * * * * * *

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United

States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * * * *

28 U.S.C. 2674

LIABILITY OF THE UNITED STATES

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

* * * * * * *

28 U.S.C. 2680

EXCEPTIONS

The provisions of this chapter and section 1346 (b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

* * * * * * *

6. Relevant portions of U.S. Department of Commerce, Bureau of Public Roads, Policy and Procedure Memorandum 21-11.1, issued March 31, 1958, provided:

Program and Project Procedures

Subject: Maintenance (Inspection and reporting)

1. Purpose

The purpose of this memorandum is to prescribe policies and procedures for fulfilling Bureau of Public Roads responsibilities in regard to inspection and reporting on maintenance of completed highway projects constructed in accordance with Federal highway legislation, except those projects maintained by or in behalf of Public Roads.

2. Definition of Maintenance

a. Sections 7 and 8 of the Federal Highway Act 1921 contains the following definition of maintenance:

"The term 'maintenance' means the constant making of needed repairs to preserve a smooth surfaced highway."

b. For the purpose of evaluating maintenance performance, the foregoing definition is construed to mean the preservation of the entire highway, including surface, shoulders, medians, roadsides, structures, and such traffic service and control devices as are necessary for its safe and efficient utilization.

3. Authority

a. Sections 7 and 8 of the Federal Highway Act of 1921 provide, in part, that States shall make

provision for State funds required each year for the maintenance of all Federal-aid projects, and that the Bureau of Public Roads shall approve the character of the maintenance of such projects.

b. Section 14 of the Federal Highway Act of 1921, as amended by Section 6 of the Federal-Aid Highway Act of 1950, states as follows: (quoting)

c. Section 12 of the Federal-Aid Highway Act of 1944 provides that Public Roads shall concur in the location, form, and character of only such installments of signs, signals, and other traffic control devices on Federal-aid projects as will promote the safe and efficient utilization of the highways.

d. Section 1.110(c), 1.16(a) and (b), and 1.17 of the Regulations for the Administration of Federal-Aid Highways, effective February 21, 1957, provide for the prohibition of encroachments on rights-of-way of Federal-aid projects, and implement the appropriate sections of the Federal-Aid Road Act, as amended and supplemented, pertaining to the maintenance of projects constructed under the Act.

4. Projects to be Inspected

a. Periodic maintenance inspections by Public Roads engineers shall be made of the following projects:

(1) All completed projects constructed under the provisions of the Act and located on approved routes of the Federal-aid highway systems.

5. Objectives and Methods of Accomplishing

a. Maintenance inspection and reporting procedures have as principal objectives:

(1) The determination that States are, or are not, meeting the requirements of Federal highway legislation in providing proper maintenance, including the prohibition of right-of-way encroachments and the provisions of proper signs, signals, and other traffic control devices; and if not, the securing of corrective measures.

6. Responsibility

a. To fulfill the responsibility of Public Roads division engineers shall develop such inspection, reporting, and record keeping procedures for individual States as are deemed necessary to secure compliance with appropriate Federal legislation and regulations.

b. Division engineers shall be responsible for maintaining such records as will (1) assure retention of Federal-aid project identity, (2) inspection control including such features as signing, marking, right-of-way encroachments, full or partial control of access and other traffic controls, (3) continuity of inspection, and (4) proper administration.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13726

LEOPOLD W. MAHLER AND HELEN E. MAHLER, HIS WIFE, AND BERTHA EBERTSHEIM,
Appellants,

v.

UNITED STATES OF AMERICA

Appeal From the United States District Court for the Western District of Pennsylvania

Argued February 6, 1962

Before BIGGS, *Chief Judge*, and MCLAUGHLIN and HASTIE, *Circuit Judges*

Opinion of the Court

(Filed June 27, 1962)

By BIGGS, *Chief Judge.*

Jurisdiction in the case at bar is asserted under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680, to recover damages for property damage and personal injuries suffered by the plaintiffs-appellants, when the car in which they were riding on September 21, 1958, ran into a large boulder that had fallen from a steep embankment onto the Penn-Lincoln Parkway in Pittsburgh, Pennsylvania. The portion of the Penn-Lincoln project at which the boulder had fallen and the accident occurred was constructed with a 50% grant-in-aid from the fed-

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eral government under the federal aid highway program. See 23 U.S.C. §§ 1-175 (1952 *ed.*).[1] The court below, on motion for summary judgment made by the appellee, the United States, pursuant to Rule 56, Fed. R. Civ. Proc., 28 U.S.C., entered judgment for the United States, basing that judgment on, among other things, Section 288 of the Restatement of the Law of Torts.[2] The court below held in substance that assuming for the purposes of the motion for summary judgment that there was no adequate inspection or supervision of the highway by the Secretary of Commerce and that such an inspection was a duty made mandatory by 23 U.S.C. § 13, nonetheless the United States could not be liable for damages under the

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1. Citations to 23 U.S.C. are to the 1952 edition (including Supp. V) through August 27, 1958 (before which time the negligent acts and omissions are alleged to have taken place). This legislation was recodified in part and superseded in part on the above date, 72 Stat. 885-921, although the purpose was not to change the substance of the provisions. S. Rept. No. 1928, 85th Cong., 2d Sess.

2. As follows: "The violation of a legislative enactment by doing a prohibited act or by failing to do a required act, does not make the actor liable for an invasion of an interest of another caused thereby, if the enactment is designed exclusively:

(a) to protect the interests of the state or municipality, as such, or

(b) to secure to individuals the enjoyment of rights or privileges to which they are entitled only as members of the public, or

(c) to impose upon the actor the performance of a service which the state or municipality undertakes to give to the public, except where the actor is under a contract duty to perform a service which the state or municipality is under a legal duty to give."

law of Pennsylvania. The court did not deal with the contentions of the United States that the claims were based on the discretionary-function exception of the Tort Claims Act, 28 U.S.C. § 2680(a), and that Section 7 of the Federal-Aid Road Act of 1916, 23 U.S.C. § 48, excepts the United States from liability.[3] The United States approaches the problem in this court by making the correct primary assertion that there can be no liability in tort in Pennsylvania, as elsewhere, unless a defendant is guilty of a breach of some legal duty owed by him to the plaintiff. Zayc v. John Hancock Mut. Life Ins. Co., 338 Pa. 426, 430-431, 13 A.2d 34, 36-37 (1940). The plaintiffs asserts that the Federal Highway Program imposed a duty, owing the travelling public, on the United States to make sure that the segment of the road on which the accident occurred was constructed and maintained properly. They contend that the United States failed to fulfill its duty in three respects: first, by causing to be approved by the Secretary of Commerce defective plans for the project submitted to it by the Pennsylvania Department of Highways pursuant to 23 U.S.C. § 12 and by participating in planning conferences held during the preparation of the defective plans; second, by failing to discover faulty construction by inspections carried out by the Bureau of Public Roads pursuant to 23 U.S.C. § 13; and third and last, by failing to provide for and make inspections after construction was completed which, according to the allegations of the complaint as amended, would have revealed defective maintenance by the Commonwealth of Pennsylvania. The last point is bottomed upon the periodic main-

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3 See 196 F. Supp. 362 (1961).

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tenance inspections conducted by the Bureau of Public Roads. See 23 U.S.C. §§ 15, 48 and Bureau of Public Roads Policy and Procedure Memorandum 21-11.1.

Since the motion for summary judgment was granted, we must accept appellants' version of the facts. See, *e.g.*, Proctor v. Sagamore Big Game Club, 265 F.2d 196 (3 Cir.), *cert. denied*, 361 U.S. 831 (1959). When the case is viewed in this light and the exception provisions of 28 U.S.C. § 2680 are, for the moment, put to one side, there is no doubt that under the law of Pennsylvania the United States must be deemed to have breached its duty to the plaintiffs, if the provisions referred to in the preceding paragraph of this opinion for approval of the project and for its inspection imposed duties for the benefit of the travelling public. See Bollin v. Elevator Construction & Repair Co., 361 Pa. 7, 63 A.2d 19 (1949). Should this be so, recovery may be had by the plaintiffs against the United States under the Federal Tort Claims Act, which provides that the government shall be held liable when injury or death is caused by the negligent or wrongful act or omission of an employee of the government while acting within the scope of his office or employment and under circumstances where the United States, if a private person, would be liable in accordance with the law of the place where the act or omission occurred, 28 U.S.C. § 1346(b). Our inquiry therefore must be directed toward ascertaining the intent of Congress in enacting the pertinent legislation.

Our conclusions are aided greatly by the relevant legislative history. We state preliminarily that when legislating in respect to roads Congress acts under the

authority conferred upon it by Article I, Section 8, of the Constitution to regulate interstate commerce, to establish post roads, and to provide by expenditure of tax revenues for the National Defense and the General Welfare. But it is clear nonetheless that the construction, maintenance and the regulation of highways have remained state functions. South Carolina State Highway Department v. Barnwell Bros., 303 U.S. 177, 187 (1938). In the cited case Mr. Justice Stone said: "From the beginning it has been recognized that a state can, if it see fit, build and maintain its own highways, canals and railroads and that in the absence of Congressional action their regulation is peculiarly within its competence, even though interstate commerce is materially affected. *Minnesota Rate Cases,* 230 U.S. 352, 416. Congress not acting, state regulation of intrastate carriers has been upheld regardless of its effect upon interstate commerce. *Id.* With respect to the extent and nature of the local interests to be protected and the unavoidable effect upon interstate and intrastate commerce alike, regulations of the use of the highways are akin to local regulation of rivers, harbors, piers and docks, quarantine regulations, and game laws, which, Congress not acting, have been sustained even though they materially interfere with interstate commerce." 303 U.S. at 187-188. In note 5 cited to the text, Mr. Justice Stone cites a large number of cases in which the Supreme Court has upheld state regulations materially affecting interstate commerce. In Maurer v. Boardman, 366 Pa. 17, 7 A.2d 466 (1939), *aff'd sub nom.* Maurer v. Hamilton, 309 U.S. 598 (1940), it was held that the highways in Pennsylvania are owned by the Commonwealth and that their

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preservation and the maintenance of safety on them are a concern of the state. It seems clear from the Acts of Congress and their accompanying legislative history, that grants-in-aid under the Federal Highway Program were and are designed to encourage states to construct their own highways and that the primary function of the Bureau of Public Roads, in approving plans submitted to it by a state and inspecting roads during and after construction, is that of making sure that federal appropriations are being utilized properly and efficiently by the respective states and are not being wasted.

Funds appropriated by Congress for the highway program are apportioned to the states according to a statutory formula, 23 U.S.C. §§ 21, 21a, 21a-2. The states then create general programs to employ these funds and prepare estimates for each project. 23 U.S.C. § 12. Construction contracts are awarded by the states. The states pay the contractor and the respective states become and remain responsible for supervision of construction and for the maintenance of the highways after completion. 23 U.S.C. §§ 13, 15. The states are at all times the owners of the roads and are primarily responsible for their operation.

Under the Federal Highway Program the Bureau of Public Roads approves the projects and detailed plans of construction submitted by the respective states before it assumes any obligation to reimburse any state for a percentage of construction costs. 23 U.S.C. § 12. It also assures itself, by inspection, that the construction is in accordance with the plans agreed upon. 23 U.S.C. §§ 13, 14, albeit subject to the direct supervision of the state. 23 U.S.C. § 13. If the Bureau decides that a state is not

maintaining properly a highway constructed with funds supplied by the United States it notifies the state and if, within a specified time, proper maintenance is not effected, federal aid funds are withheld in the future. 23 U.S.C. §§ 15 and 48.

The statutory scheme shows a weighting of the functions to be performed by the states and the Bureau of Public Roads, acting for the United States. The states are given what has been aptly described as "operational control" of the projects. Congress gave the Bureau veto power insofar as the use of federal funds were concerned.

The legislative history of the original Federal-Aid Road Act of 1916, 39 Stat. 355, makes the intent of Congress, at least insofar as that Act was concerned, clear indeed. During the period of time in which the Penn-Lincoln project was designed and constructed, the obligation of the Bureau of Public Roads to approve construction plans, to inspect the roads during their construction, and to withhold funds if the states failed to maintain properly highways constructed with federal funds was imposed on the Bureau by the statutes referred to above. All find their source in the Federal-Aid Road Act of 1916.[4]

H.R. 7617, which, as amended, became the Federal-Aid Road Act of 1916, was reported by the House Committee on Roads wtih the note that "primarily roads are local concerns and jurisdiction over them belongs to the States and local authorities." H.Rep. No. 26, 64th Cong.,

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4. Act of July 11, 1916, ch. 241, §§6, 7, 39 Stat. 357-358.

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1st Sess. p. 4. But, "while the States and local authorities ought not to be ousted from jurisdiction over roads within their borders, yet Federal funds appropriated for roads must be rigidly safeguarded It must be seen to that every dollar of this money expended secures a dollar's worth of road construction and road maintenance. To accomplish this, very large discretionary powers have, by this bill, been given to the Secretary of Agriculture."[5] *Id.*, at pp. 4-5. That the purpose of the powers given to the federal government was to protect public funds is made clear by the comments of Representative Saunders, a member of the House Committee on Roads, who stated:

> "As I said, if a project of road development is desired to be submitted by a State, that State approaches the Federal Government through its road commission.
>
> "In other words, the unit is the State. The representative of that commission presents the project to the Agricultural Department, giving a sufficient outline of the improvement desired to enable the experts of the Agricultural Department to determine in advance whether the proposition is, or is not, meritorious. Then if the department is inclined to think that the proposition thus presented is meritorious, and worthy of aid out of that proportion of the general fund which is segregated for that particular State, it may call upon the State to fur-

5. These powers are now exercised by the Secretary of Commerce. See 1939 Reorg. Plan No. 1, 53 Stat. 1426; Act of June 30, 1949, §103(a), 63 Stat. 380; 1949 Reorg. Plan No. 7, 63 Stat. 1070.

nish further information, and such data, estimates, and plans as will enable the experts of the department to determine the cost of construction, and the full merits of the project, in a word to determine in relation to the case submitted everything that the Federal department ought to know before reaching its conclusions.

"Having advanced thus far, if the department approves the project as a whole, the State is authorized to proceed with the work. When the work is concluded, and it is ascertained by the Federal department through its appropriate agents, that the work has been done according to the plans approved by its experts, then the department may make payment of the sum which has been decided upon for this particular project of road construction, improvement, or maintenance. Will any gentleman on this floor suggest that up to this point there is anything of authority lacking to the Federal Government to enable it to safeguard the expenditure of its money, or to compel the construction of the improvements contemplated, upon the terms agreed on between the contracting sovereignties?" 53 Cong. Rec. 1281.

Representative Saunders stated that the federal interest was protected by the provisions for inspection during construction to insure that work should be done in accordance with the approved plans and a colloquy ensued between him and Representative McLaughlin, 53 Cong. Rec. 1530, as follows:

"Representative McLaughlin. The Secretary of Agriculture is apprised as to the money that has

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been expended in the State, but this bill directs him by actual inspection of the work to know that the money has been properly expended.

"Representative Saunders. Certainly, and that provision is intended to safeguard the Federal interest. The Department of Agriculture in the discharge of its duty can not, and ought not, to expend a dollar under this bill, until it is thoroughly satisfied that the work arranged for has been done in absolute conformity with the requirements of the department. Hence, as I have said, the payment is not one for future expenditures, but is compensation for work already done, and already approved by the Secretary of Agriculture."

That the provision for submission of the plans to the federal government for approval had the same purpose is made clear by an exchange between Representatives King and Saunders:

"Mr. King. The final determination rests with the Federal department at Washington?

"Mr. Saunders. Yes, it can put a veto on any proposition that the State submits. I submit that under this bill it will be impossible to expend the money of the Government wastefully and extravagantly, unless the Agricultural Department is corrupt, or inefficient." 53 Cong. Rec. 1282.

The intent of the House with regard to the overall effect of the protective devices written into the bill was expressed by two members of the Committee on Roads:

"Mr. Browne. . . . [Y]ou have the Secretary of Agriculture of the United States and his experts to

say what kind of a road shall be built and whether a particular road is one that should have Federal aid or not. I think that the money the Government is called upon to appropriate is safeguarded in every way, and that the Government can be sure that the money appropriated by it is going to be used wisely and economically." 53 Cong. Rec. 1274.

"Mr. Saunders. . . . Further, we expect to satisfy the most exacting critic of this measure that the interests of the Federal Treasury are adequately safeguarded, and that every precaution has been taken to guarantee that the Federal contribution in aid of road construction, will be wisely, economically, and judiciously expended. As guardians of the Federal Treasury we should surround the expenditure of Federal money with appropriate protective provisions. This we have done." 53 Cong. Rec. 1280.

In reporting the amended version of H.R. 7617, the Senate Committee on Post Offices and Post Roads agreed with the House that expenditure of federal funds must be protected:

"No policy of federal aid should be adopted which does not permit the retention by the States of the fullest measure of control consistent with the necessary inspection and safeguarding which is customary with all Federal appropriations. This balance of powers and duties as between the Federal Government and the States can readily be accomplished by leaving to the States the initiative in determining whether or not they desire to avail themselves of Government aid, the direct supervision of every step of the construction and improve-

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ment, leaving only to the Federal Government the fullest measure of latitude in the way of inspection and approval at each step of the undertaking. This should provide, at the same time, harmony and efficiency without overlapping of duties and without clashing of interest or authority." S. Rep. No. 250, 64th Cong., 1st Sess., pp. 15-16.

The Committee, however, did not agree with members of the House who maintained that the bill as passed by the House met this need. The Report stated, at pp. 22-23:

> "The bill H.R. 7617, passed by the House of Representatives . . . is most seriously defective in its failure to afford reasonable inspection and safeguarding on the part of the Federal Government of the Federal appropriations. A careful reading of section 3 of the House bill reveals the fact that no power is vested in the Secretary of Agriculture to disapprove the application by a State highway department for aid under the provisions of the act unless the road for which aid is sought fails to come within the provisions of the act. Inasmuch as the act passed by the House brings practically every class of roads in the United States within the provisions of the act, the Secretary of Agriculture would have no power to disapprove the application . . . . He is given no power of approval or disapproval of the plans, surveys, specifications, and estimates, but is only authorized to examine them and determine what would be a reasonable cost of the proposed improvement."

In writing stronger safeguards into the bill, the Senate Committee thought that an adequate procedure had been achieved:

> "Initiative on the part of the States in availing themselves of the benefits of Federal aid is provided in section 6, and in the same section they are further called upon to make all surveys, plans, specifications, and estimates for improvements to be made under the terms of the act, and it is further provided that the States shall have direct supervision of construction. Thus is reserved to the States all that could possibly be expected by the most earnest advocate of State rights. The same section, however, provides adequate safeguards by vesting in the Secretary of Agriculture the power of approval of the applications made by the States, the surveys, plans, specifications, and estimates furnished by them, and he is given the power of inspection and approval of the work as it progresses. This is an admirably balanced plan of cooperation, and there seems to be no reason why it should not produce excellent results." *Id.* at p. 21.

Senator Bankhead, in moving H.R. 7616 on the floor,[6] stated, 53 Cong. Rec. 6429:

> "The highway commission of the State . . . submit[s] the plans; they designate the road to be built, its location, and the estimate for the improvement, to the Secretary of Agriculture; and while I

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6. The Senate Committee version as amended on the floor of the Senate by amendments not relevant here became in fact the Federal Aid Road Act of 1916, 39 Stat. 355. See Sen. Rep. No. 250, 64th Cong., 1st Sess.

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regret, Mr. President, that we found it necessary to do so, we had to lodge the veto power somewhere, and we thought it best to give to the Secretary of Agriculture the power to say: 'That is not a proper road to be built; it is not in a proper place; the construction of it is not what it ought to be; the estimate of cost is too high; and I am not, as the representative of the Government of the United States, willing to approve it and put up half the money for it.' That is the proposition."

When H.R. 7617 passed the House of Representatives it contained no provision requiring the maintenance of a federal-aid road when constructed. The Senate considered this to be a defect and accordingly H.R. 7617 was amended to add the provision which became Section 7 of the 1916 Act. See S. Rep. No. 250, 64th Cong., 1st Sess., p. 22. In substance Section 7, 39 Stat. 358, imposed the duty of maintenance of the roads upon the states or their civil subdivisions, according to state law, and provided that if "at any time" the Secretary of Agriculture found that a highway was not being properly maintained he should give notice to the offending state and after four months if the state had not put the road into proper condition of maintenance, the Secretary should thereafter refuse to approve any project for road construction in the offending state. H.R. 7617 as originally brought to the Senate floor provided that the Secretary was authorized to withhold approval of any project for road building in an offending state. By an amendment, 53 Cong. Rec. 6584, the duty was made mandatory, the bill providing that the Secretary of Agriculture "shall thereafter refuse to approve any project for road construction in said State . . .".

This was to avoid waste of federal funds. Senator Harding stated, 53 Cong. Rec. 6580:

> "I do not hesitate to say that the greatest crime in public expenditures to-day is the wanton waste of money in the construction of roads without ample provision for their maintenance."

Senator Norris said, 53 Cong. Rec. 6783:

> "A State that shall not have the machinery for road maintenance and a State that does not keep such machinery actively in operation to maintain the roads ought not to have Federal assistance in building other roads. It is true that when the roads are all built, if the State does not maintain them they would go to ruin, and the Federal Government could not help itself. About the only thing we can do is to say to the State, 'If you do not maintain this road, which we in part construct out of the Federal Treasury, then we will give you no more money to help construct other roads' . . . . [T]he real place where this amendment[7] would be applicable, Senators, would be in case some State had no such machinery and made no attempt to maintain its roads, and when that is evident, then we ought to stop paying out the public money for the con-

7. The amendment referred to by Senator Norris was offered by him and was an attempt to eliminate the provision for notice by the Secretary prior to the withholding of federal funds for future projects because of the failure of maintenance by a state. See 53 Cong. Rec. 6580-6584, 6782-6785. The Norris amendment was not adopted but there can be no question that there was agreement in the Senate that after notice federal funds should be withheld. See 53 Cong. Rec. 6840-6841; Federal-Aid Road Act of 1916, § 7, 39 Stat, 358.

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struction of roads in that State. It seems to me that it would be only fair that we should do that, and that as a practical defense of the Treasury of the United States we ought to do that."

The recital of legislative history of federal-aid legislation might be prolonged to a much greater length but what we have said makes it clear, we think, that in enacting the provisions respecting approval and inspection by the federal government, it was not the intention of Congress to impose as a duty on the Secretary of Commerce, on the Bureau of Public Roads, or on the United States or any of its agencies, to make sure that a member of the travelling public, a user of a federal-aid highway, was not injured because of negligence in carrying out these provisions. The concern of Congress was to make sure that federal funds were effectively employed and not wasted.[8]

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8. This conclusion is aided by the decision in United States v. Neustadt, 366 U.S. 696 (1961). In that case an attempt was made to hold the United States liable under the Federal Tort Claims Act by the purchaser of a residential property who had been furnished a statement reporting the results of an inaccurate FHA inspection and appraisal and who, relying on it, had been induced by the seller to pay a purchase price in excess of the fair market value of the property. True, in the cited case the Supreme Court concluded that the case turned upon the correct interpretation of Section 2680(h), Title 28, U.S.C., which precluded recovery under the Act upon "[a]ny claim arising out of . . . misrepresentation". But in reaching the determination that Congress had no intention of making FHA appraisals an exception to the "misrepresentation" rule in the FTCA, the Supreme Court stated, *id.* at p. 709, that the "primary and predominant objective of the appraisal system was

The pertinent provisions of the Federal-Aid Road Act of 1916 were incorporated into the Federal Highway Act of 1921, 42 Stat. 212. The concern of the Congress in 1916 that federal funds be not dissipated but used effectively by the states is reiterated in a House report on S. 1072, the bill which became the Act of 1921, as follows: "The purpose in presenting this bill to Congress is to provide amendments to the present law and to outline a definite plan for road construction, as well as to make such requirements as will conserve the public funds . . . . " H. Rep. No. 162, 67th Cong., 1st Sess., p. 4. The basic structure thus created by these statutes has been the foundation for all subsequent federal highway legislation. See S. Rep. No. 1965, 84th Cong., 2d Sess., p. 4 (1956); Report of the President's Advisory Committee on a National Highway Program, H. Doc. No. 93, 84th Cong., 1st Sess., p. 4 (1955); Levin, Federal Aspects of the Interstate Highway Program, 38 Neb. L. Rev. 377, 378 (1959); Note, 108 U. Pa. L. Rev. 534, 538-539 (1960). In light of the legislative history traced above, it is plain that the appellants cannot successfully rely on the

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the 'protection of the Government and its insurance funds' ", basing its conclusion on the legislative history of the National Housing Act of 1934, as amended, 12 U.S.C.A. §§ 1701 *et seq.* See notes 20, 21 and 22, cited to the text at 366 U.S. 709. We think that the legislative history set forth at length above, while not so explicit as that cited by Mr. Justice Whittaker in Neustadt, is persuasive in demonstrating that the congressional purpose in providing for design approval and road inspections was essentially the same as that which requires FHA appraisals. See also Weinstein v. United States, 244 F.2d 68 (3 Cir.), *cert. denied*, 355 U.S. 868 (1957). Compare Somerset Seafood Co. v. United States, 193 F.2d 631 (4 Cir. 1951).

federal highway acts unless they are able to show that legislation following the Act of 1921 has affixed to the inspection and approval sections the additional purpose of securing the safety of those using the federal-aid highways.

Although Congress early exhibited an awareness of the problem of highway safety[9] and this awareness has continued to manifest itself in legislation dealing with the federal highway program,[10] we have discovered nothing which would indicate that *Congress has redesigned the inspections* during and after construction to function as anything more than that which was originally intended, viz., a means of protecting the federal investment. Without such an expansion of purpose, the inspection provisions of the statute do not create a duty running to these plaintiffs.

Inasmuch as we find that the federal statutes relating to inspection of highways do not create a duty on the part of the United States running to the plaintiffs, the only remaining basis for liability under the Tort Claims Act, if there be any, must be general Pennsylvania law.

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9. See Section 18 of the Federal Highway Act of 1921, 42 Stat. 216, which provided that the Secretary should make necessary recommendations to the Congress and the state highway departments regarding preservation of the highways and assurance of the "safety of traffic thereon."

10. See Federal-Aid Highway Act of 1944, § 12, 58 Stat. 843 (now 23 U.S.C.A. § 109(d) (Supp. 1961); Federal-Aid Highway Act of 1952, § 9, 66 Stat. 161 (now 23 U.S.C.A. § 313 (Supp. 1961)); Federal-Aid Highway Act of 1954, § 10(a), 68 Stat. 74 (now 23 U.S.C.A. § 307 (a) (Supp. 1961); Federal-Aid Highway Act of 1958, §12, 72 Stat. 95 (now 23 U.S.C.A. § 131) (Supp. 1961).

We have carefully weighed the appellants' arguments and the authorities cited by them as well as the facts in the record which the appellants claim support their position. But we have been directed to and we have discovered no Pennsylvania rule of law which would impose liability on a private person under similar circumstances. Bollin v. Elevator Construction & Repair Co., 361 Pa. 7, 63 A.2d 19 (1949), relied on by the appellants, does not aid them. In the cited case, Pennsylvania law provided for mandatory periodic inspections of elevators. 35 P.S. § 1347. Obviously, the statute was enacted to provide for the safety of those who ride elevators. See 35 P.S. §§ 1348, 1349. Pursuant to 35 P.S. § 1345, if an elevator is insured by a company authorized to insure elevators in the Commonwealth, the inspection of the elevator "may be made" by an employee of the insurance company. The Pennsylvania Supreme Court held that if an insurance company chooses to exercise the inspection right given by Section 1345, the statute imposes a duty on the company to inspect with care, this duty running to those using or operating the elevator. In contrast, the legislative history of the highway acts indicates that federal inspections were designed for the limited purpose of safeguarding the government's financial interest and that a duty such as that present in the Bollin case was not intended by Congress. There being no cognizable duty found to be owing the plaintiff-appellants by virtue of the inspection sections of the statute, we are of the opinion that Pennsylvania law provides no basis for liability on the part of the United States for the alleged negligence in carrying out the provisions of 23 U.S.C. §§ 13, 15, 48.

The claim asserting negligence by the United States in approving the plans submitted by the Commonwealth, pursuant to 23 U.S.C. §12, cannot be dismissed on this ground. Although the legislative history of the original enactment indicates that the purpose of federal approval of highway plans and specifications was limited in the same fashion as was federal inspection, Congress has since specifically directed that highway safety also be considered in passing on submitted highway designs. Section 12 of the Federal Aid Highway Act of 1938, 52 Stat. 636, provided as follows: *"Hereafter the Secretary of Agriculture shall approve only* such methods of bidding and *such plans and specifications of highway construction for the type or types proposed as will be* effective in securing competition and *conducive to safety,* durability, and economy of maintenance."[11] In so legislating; Congress made safety a consideration in federal approval of a federal-aid highway project. In effect, the Secretary's approval is a certification that the plans and specifications are "conducive to safety". There can be little doubt that the acts of negligence alleged, if made out, would constitute a breach of Section 12 of the Act of 1938. However, assuming without deciding that this breach brings the United States within the doctrine of Bollin v. Elevator Repair & Construction Co., *supra,* the

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11. Emphasis added. Codified in the 1952 edition of the United States Code as amended, at 23 U.S.C. §8a; now found at 23 U.S.C.A. § 109(a) (Supp. 1961). The legislative history indicates that this provision was designed primarily to protect the federal investment. See 83 Cong. Rec. 6383-6384 (1938). However, the italicized language expresses what must be regarded as at least a subsidiary purpose, that of promoting the construction of safe highways.

government cannot be held liable under the Federal Tort Claims Act for its participation in formulating the plans and subsequent approval thereof. The statutory language pertaining to safety is one of numerous standards to which the Secretary of Commerce must look in determining whether or not approval is to be given to the design and specifications for a highway project. We cannot avoid the conclusion that this determination by the Secretary, as well as any active participation by the federal government in the design, falls within the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(a).[12] Such a result seems to us to "be compelled by the Supreme Court's opinion in Dalehite v. United States, 346 U.S. 15 (1953). It is there stated, at pp. 35-36: "[T]he 'discretionary function or duty' that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion."[13] The Court

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12. "The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

13. Although there are portions of the Dalehite opinion which are no longer authoritative, we do not read Rayonier, Inc. v. United States, 352 U.S. 315 (1957) or Indian Towing Co. v. United States, 350 U.S. 61 (1955), as having retracted the language quoted. Therefore the plaintiffs' citation of Jemison v. The Duplex,

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found the United States not liable for decisions made "at a planning rather than operational level and . . . [involving] considerations more or less important to the practicability of the Government's fertilizer program." 346 U.S. at p. 42. The determination by the Secretary of Commerce to approve the plans and specifications for the Penn-Lincoln project, the decision which initiated the federal government's financial participation, was obviously a policy judgment[14] of the type most important to the success of the federal-aid program. It is administrative action requiring the conscious weighing of such factors as location and anticipation of future traffic flow. The same must be said of federal guidance during the pre-approval design stage. As such, we think that these decisions fall on the planning side of the planning-operational distinction drawn in the Dalehite case, subsequently adopted and approved in Eastern Airlines, Inc. v. Union Trust Co., 221 F.2d 62, 76-77 (D.C. Cir), *aff'd per curiam sub nom.* United States v. Union Trust Co., 350 U.S. 907 (1955).[15] Thus, in the instant case Section 2680(a) withdraws the government's waiver of immunity, insofar as the complaint is based on the

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163 F. Supp. 947 (S.D. Ala. 1958), a case decided against the United States on analogous facts, must be rejected, inasmuch as we are unable to reconcile the holding in that case with the pertinent language of Dalehite.

14. See S. Rep. No. 250, 64th Cong., 1st Sess. pp. 22-23 (1916); H. Rep. No. 26, 64th Cong., 1st Sess., p. 4 (1916); 53 Cong. Rec. 6429 (1916) (remarks of Senator Bankhead).

15. See also Dahlstrom v. United States, 228 F.2d 819 (8 Cir. 1956).

allegedly negligent planning and approval of the highway project by the Secretary of Commerce.

For these reasons, the judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,726

LEOPOLD W. MAHLER and HELEN E. MAHLER, his wife, and BERTHA EBERTSHEIM, Appellants,
v.
UNITED STATES OF AMERICA

On Appeal From the United States District Court For the Western District of Pennsylvania

Present: BIGGS, Chief Judge, and MCLAUGHLIN and HASTIE, Circuit Judges.

Judgment

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the the same is hereby affirmed.

Attest:
IDA O. CRESKOFF
Clerk

June 27, 1962

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,726

LEOPOLD W. MAHLER and HELEN E. MAHLER, his wife, and BERTHA EBERTSHEIM, Appellants,

v.

UNITED STATES OF AMERICA

PRESENT:

BIGGS, Chief Judge, and MCLAUGHLIN, KALODNER, HASTIE, GANEY and SMITH, Circuit Judges.

Sur Petition for Rehearing

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

BY THE COURT

BIGGS

Chief Judge

Dated:
July 20, 1962